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(2)

No. 06-1300

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

KELLY HACKWORTH,

Petitioner,

v.

PROGRESSIVE CASUALTY INSURANCE COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Tenth Circuit correctly upheld regulation 29 C.F.R. § 825.111(b) as it directly parallels the stated purpose of the small operations exemption in the Family and Medical Leave Act.

II. Whether the Tenth Circuit correctly upheld regulation 29 C.F.R. § 825.111(b) where the statute is silent on the issue and the regulation is a permissible interpretation of the statute.

III. Whether the Tenth Circuit properly determined that Petitioner failed to timely utilize the protections of the Federal Rules of Civil Procedure, Rule 56(f).

PARTIES TO THE PROCEEDING

Petitioner:

(1) Kelly D. Hackworth
4107 West Pittsburg Circle
Broken Arrow, Oklahoma 74012

Respondents:

(1) Progressive Casualty Insurance Company
6300 Wilson Mills Road
Mayfield, Ohio 44143

(2) Jerry Johnson
Progressive Casualty Insurance Company
7666 East 61st Street, Suite 300
Tulsa, Oklahoma 74133

CORPORATE DISCLOSURE STATEMENT

Progressive Casualty Insurance Company states that The Progressive Corporation owns one hundred percent of Progressive Casualty Insurance Company's stock and is the only parent corporation of Progressive Casualty Insurance Company.

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OPINIONS BELOW

The United States District Court for the Western District of Oklahoma granted summary judgment to the Respondents, Progressive Casualty Insurance Company ("Progressive") and Jerry Johnson ("Johnson") (hereinafter collectively referred to as "Respondents"), by determining that Respondents were excluded from the Family and Medical Leave Act's coverage pursuant to the small operations exemption contained therein. The United States Court of Appeals for the Tenth Circuit affirmed, reported at *Hackworth v. Progressive Cas. Ins. Company*, 468 F.3d 722 (10th Cir. 2006). The Tenth Circuit denied without opinion the Petition for Rehearing of Petitioner, Kelly Hackworth ("Petitioner").

JURISDICTION

The Tenth Circuit's November 14, 2006, Opinion renders this case reviewable pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This appeal involves the meaning of the term "miles" as stated in 29 U.S.C. § 2611(2)(B)(ii) of the Family and Medical Leave Act of 1993 ("F.M.L.A."), and the F.M.L.A. regulation which defines the term "miles" as surface transportation miles, 29 C.F.R. § 825.111(b).

STATEMENT OF THE CASE

As noted by the Tenth Circuit Court of Appeals in its thorough and well-reasoned November 14, 2006, opinion, the present case is nothing more than a game of "what-if . . . " In other words, Petitioner, a former disgruntled employee, wants a do-over. Specifically, after judgment was entered for Respondents, Petitioner, for the first time, made several arguments and requests, including requesting time to conduct discovery on the number of employees employed by Progressive within 75 miles of Progressive's Norman office. For the reasons set forth below, Petitioner's belated arguments and requests do not merit this Court's review.

Petitioner was continuously employed with Progressive from March 26, 1996, to June 22, 2004. In November 2003, Progressive operated a casualty unit located in Norman, Oklahoma, which was supervised in part by Petitioner. Petitioner reported directly to Johnson, who worked in Progressive's Tulsa office. Progressive also maintained a Lawton office and an Oklahoma City office.

In December 2003, Johnson evaluated the Oklahoma claims organization to ensure alignment with Progressive's desired goals. For example, one Progressive goal is to ensure most claims are handled by "generalist" claim representatives (persons who can handle both property damage and bodily injury claims), rather than "casualty" claim representatives (persons who can only handle bodily injury claims). Such action was in conformity with a company-wide initiative for claims representatives to become less specialized and to handle both the casualty and property damage features of a claim. Due to the push to use generalist representatives, there was less need for the casualty unit in Oklahoma.

As a result of Progressive's goal, a reorganization of the Oklahoma casualty operations became necessary in early 2004. Of course, because Petitioner's primary responsibility concerned the casualty unit, she was impacted by the reorganization, which included a change in job title. Even before the announced reorganization, Petitioner made it clear that she opposed the contemplated reorganization. For a multitude of reasons, Petitioner did not believe it was in her or Progressive's best interest to reorganize in the fashion Johnson envisioned.

In retaliation for initiating a reorganization, Petitioner began filing Charges of Discrimination with the Equal Employment Opportunity Commission against Progressive. She recruited other co-Progressive employees in the casualty unit to do the same.[1] Further, when advised that her job title would change as a result of the reorganization, Petitioner immediately requested time off under the F.M.L.A.[2] Eventually, Petitioner was terminated in June of 2004 because she refused to accept a change to her title or the severance. In response to the termination, Petitioner filed the instant litigation, asserting that

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[1] *See Diane F. Jones v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-867; *Terry J. Murphy-Rhude v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-902; and *Sandra L. Patterson v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-1095.

[2] Due to the job title change, Petitioner was offered a severance package, while on leave. Specifically, Petitioner took leave on March 19, 2004. On that date, there were 18 employees in Progressive's Norman office, 29 employees in Progressive's Oklahoma City office, and 3 employees in Progressive's Lawton office.

Progressive terminated her in violation of the F.M.L.A.[3] Not only do Petitioner's factual claims lack merit, but she did not even meet the threshold test for eligibility under the F.M.L.A. at the time she requested leave.

In response to Plaintiff's allegations, Respondents moved for Summary Judgment, asserting that Progressive employed only 47 employees within 75 surface miles of Petitioner's worksite, and that, therefore, the court did not have jurisdiction.[4] In her response brief, Petitioner stated that she "does accept [Respondents' payroll figures] and relies upon them for purpose of this response." (*See* Respondents' App., p.29.) Instead of attacking the validity of Respondents' payroll figures, Petitioner simply alleged that the 47 employees within 75 miles figure was incorrect because Respondents used a surface mile computation instead of a radius measurement. Respondents filed a reply brief, again asserting that the correct method of measuring distance in this scenario was surface mile

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[3] Petitioner also filed a separate lawsuit against Progressive on December 19, 2005. *See Kelly Hackworth v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-1467. In that case, Petitioner asserted three causes of action: gender discrimination, hostile work environment and retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission. Interestingly, at trial, Petitioner was asked if there were any other reasons for her termination other than the three asserted causes of action set forth above (*i.e.*, whether she was terminated because she went on F.M.L.A. leave). Petitioner answered, "no." (*See* Transcript of the Proceedings, dated February 12-13, 2007, Respondents' App., p.35.)

[4] Petitioner erroneously alleges in her Petition that Respondents did not rely upon 29 C.F.R. § 825.111(b) in their Motion for Summary Judgment. (*See* Petition, p.4.) Nothing could be further from the truth. Respondents explicitly cited and relied upon 29 C.F.R. § 825.111(b) in their Motion for Summary Judgment. (*See* Respondents' App., p.14.)

measurement, pursuant to the Secretary of Labor's regulations, 29 C.F.R. § 825.111(b).

The District Court and Tenth Circuit agreed with Respondents' position. Specifically, the Tenth Circuit and the District Court determined that Progressive's Norman and Lawton worksites were more than 75 miles apart, and therefore, the aggregate number of employees within 75 miles of either worksite did not exceed 50. These determinations effectively removed Respondents from the F.M.L.A.'s coverage pursuant to the F.M.L.A.'s small operations exemption, 29 U.S.C. § 2611(2)(B)(ii). Petitioner disputes the determinations of the lower courts,[5] and asserts instead that the two worksites were less than 75 miles apart if the miles are measured using a linear or radius method, or "as the crow flies." However, the statute as enacted eliminates all references to a "radius" method of measuring the 75-mile distance. Furthermore, the accompanying regulation explicitly defines the distance as "surface miles, using surface transportation . . . " Although Petitioner questions the validity of this regulation, the Tenth Circuit's *Chevron*[6] analysis clearly establishes that the regulation is a permissible and valid interpretation of the statute which must, therefore, be afforded deference. Further, this appeal does not involve an issue of first impression; one other circuit has construed the term "miles" for purposes of the F.M.L.A.'s small operations

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[5] *After* the district court issued judgment for Respondents on April 28, 2005, Petitioner filed a Motion for Reconsideration attempting, *for the first time*, to rely upon a Rule 56(f) affidavit. The District Court denied this Motion. Petitioner also disputes the lower courts' refusal to allow her to conduct discovery on the issue after judgment was entered.

[6] *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

exemption, and its decision was in accordance with the Tenth Circuit's decision.[7] Therefore, this dispute does not present a fundamental issue or conflict necessitating review by this Honorable Court.

REASONS FOR DENYING THE PETITION

I. Regulation 29 C.F.R. § 825.111(b) and the Tenth Circuit's Decision Do Not Conflict with the Decisions of Other Courts or History and Intent of the F.M.L.A.

Petitioner contends that Congress' intent to use a radial method of measurement is demonstrated throughout the legislative history of the Act, and that, accordingly, the District Court and Tenth Circuit should have struck down the F.M.L.A. regulation that defines "miles" as surface miles. Admittedly, certain Senate and House Reports refer to a 75-mile "radius,"[8] but Congress deleted

[7] *See Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1150, 153 L.Ed.2d 1002 (U.S. Jan. 17, 2006) (No. 05-640).

[8] House Report No. 102-135(I) (1991) is approximately 89 pages, single spaced. In this voluminous report, the word radius is only mentioned one time. However, in the same House Report, the House defined an eligible employee as "any employee of an employer employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within *75 miles* of that worksite is less than 50." *See Title I – General Requirement for Leave, Sec. 101. Definitions*, at p. *3 (emphasis added). As seen from this language, there is a complete omission of the word radius. This same type of language (*i.e.*, language which avoids the use of the word "radius") occurs in Sec. 104(b)(2), Employment and Benefits Protection, at p. *5. ("An eligible employee described in this paragraph is a salaried eligible employee who is among the highest paid 10

(Continued on following page)

these references from the F.M.L.A. as enacted. Pursuant to *Russello v. United States,* the references to "radius" lost all meaning upon their deletion by Congress, thereby permitting a presumption that the prior language was not intended to apply to the final version of the Act.[9] Because the references to "radius" no longer delimit the term "miles," Petitioner cannot assert that that the deleted references constitute "clear" Congressional intent.

In addition, after deleting from the F.M.L.A. all references to a 75-mile "radius," Congress refrained from clearly defining or otherwise expressing its intended method of measuring "miles." Therefore, Congress has not "directly spoken to the precise question at issue" within the meaning of *Chevron.* Rather, the statute "is silent or ambiguous with respect to the specific issue" in this case. Since the statute itself fails to express a "clear" Congressional intent to define the term "miles" as surface miles or

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percent of the employees employed by the employer *within 75 miles* of the facility at which the employee is employed." (Emphasis added)).

Senate Report No. 103-3 (1993), just as House Report 102-135, provides no clear intent on the issue. Specifically, Senate Report 103-3 addresses the mileage issue seven times in fifty-six single spaced pages. Of those seven times, the Senate Report used the phrase "75-mile radius" four times and the phrase "75 miles" three times. Importantly, within *Title IV. Committee View*, at pp. *23 and *31, the Senate Report twice states "within 75 miles" as opposed to using the phrase "within a 75-mile radius" only once (p. *23).

A similar pattern is found in Senate Report No. 202-68 (1991).

[9] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States,* 464 U.S. 16, 23-24, 104 S. Ct. 296, 301, 78 L.Ed.2d 17 (1983); *Arizona v. California,* 373 U.S. 546, 580-81, 83 S. Ct. 1468, 1487-88, 10 L.Ed.2d 542 (1963).

as linear miles,[10] it cannot be said that the regulation, or the Tenth Circuit's decision upholding it, conflicts with the clear intent of Congress.

Lastly, neither the regulation nor the Tenth Circuit's decision conflict with other district or circuit courts. The Tenth Circuit and the Fifth Circuit's *Bellum* analysis of the term "miles" as stated in the F.M.L.A. small operations exemption *stand as the only authority* on this precise issue. No district court has addressed the provision at issue, other than in dicta or other colloquial language,[11] and no other circuit has analyzed the proper method of measuring "miles" in this regard. Therefore, no circuit split exists at this time, and there is no emerging minority view to create a circuit split. Accordingly, it cannot be said that another court would reach a different result on the same or similar facts.

II. The Tenth Circuit's *Chevron* Analysis Correctly Concluded That the Regulation Is a Permissible and Valid Interpretation of the Statute

Petitioner contends that the regulation is not a permissible construction of the F.M.L.A. under the second prong of *Chevron*,[12] which applies when Congress has left

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[10] Petitioner readily conceded this issue at oral argument before the Tenth Circuit. (*See* Petitioner's Appendix, p.9a.)

[11] For example, on pages 7-8 of her Petition, Petitioner references 12 cases that mention a "75-mile radius," but none of the cases address the issue of how miles should be measured for the application of the small operations exemption.

[12] Petitioner also contends that the Secretary of Labor exceeded his authority by altering the coverage of F.M.L.A. leave. In doing so, Petitioner erroneously leads the Court to believe that this regulation has a similar effect to the regulation at issue in *Ragsdale v. Wolverine*

(Continued on following page)

an explicit or implicit gap in the statutory language, or when "the statute is silent or ambiguous with respect to the specific issue." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Under the second prong of the analysis, the court must simply determine "whether the agency's answer is based on a permissible construction of the statute," and in doing so, the court must consider only whether the regulation is arbitrary, capricious, or manifestly contrary to the statute. *Id.*

In the case at bar, the statute fails to define the intended method of measuring "miles," and pursuant to *Russello*, the historical references to a 75-mile "radius" lost all meaning when Congress eliminated said references from the Act. Since the statute is "silent or ambiguous" as to the proper measurement of "miles," the Tenth Circuit analyzed the accompanying regulation under the *Chevron* doctrine and concluded the Secretary's construction of the F.M.L.A. provision is a permissible interpretation of the statute based upon the stated purpose of the small operations exemption.

Congress included in the F.M.L.A. a small employer exemption that excludes from coverage any employer with less than 50 employees, but separately provided an exclusion for "a potentially large company with a relatively small satellite office in a particular area." *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1148 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 356, 163 L.Ed.2d 65

World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155, 152 L.Ed.2d 167 (2002), which imposed certain notice requirements not required by statute. The Fifth Circuit in *Bellum* disposed of this contention in footnote 5 of its decision.

(U.S. Oct. 3, 2005) (No. 04-1647).[13] The specific purpose of this separate exclusion for small operations was to recognize and accommodate the difficulties and concerns employers face in reassigning workers to geographically separate facilities. *Id.*, quoting H.R. Rep. No. 102-135(I) at 37 (1991). The Tenth Circuit opined in *Harbert* that in enacting the small operations exemption, Congress "determined that if any employer (large or small) has no significant pool of employees *nearby* to cover for an absent employee, that employer should not be required to provide F.M.L.A. leave to that employee."[14] *Id.* at 1149 (emphasis in original).

This purpose clearly focuses on reassigning employees to geographically separate facilities during another employee's F.M.L.A. leave (twelve weeks maximum). A temporary reassignment of this nature inevitably requires transporting the replacement employee to and from the geographically separate facility. The regulation defining "miles" as "surface miles, using surface transportation" thus reasonably contemplates the inevitable consequences of an employee's temporary reassignment to cover for another employee on F.M.L.A. leave. Therefore, one cannot

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[13] In this case, the Tenth Circuit reviewed the agency's interpretation of the term "worksite" where Congress failed to define the term. Though the terms "worksite" and "miles" both appear in 29 U.S.C. § 2611(2)(B)(ii), the small operations exemption, the Tenth Circuit did not analyze the method of measuring "miles." The court did, however, discuss at length the stated purpose of the exemption.

[14] This is precisely the situation in the case at bar. Progressive did not have a significant pool of employees nearby who could have traveled less than 75 miles by surface transportation to cover for Petitioner during her F.M.L.A. leave. The Tenth Circuit recognized this practical problem as precisely the difficulty that Congress intended to accommodate for employers.

justifiably contend that the regulation at issue is arbitrary, capricious or manifestly contrary to the F.M.L.A. when considered in conjunction with the stated purpose of the small operations exemption.[15] Accordingly, the Tenth Circuit correctly concluded that the regulation is at least a permissible interpretation of the statute, and that it is, accordingly, entitled to deference.

The more general purpose of the exemption is to relieve small employers from the burdens imposed by the F.M.L.A. In 1991, Congress explained:

> [The Act] covers only employers with fifty or more employees. The exemption of employers with less than fifty employees means that 95% of all employers are excluded from the coverage of the bill. . . . While concerned about the low coverage figures, the Committee, *in recognition of the particular problems faced by small employers*, approved this provision which exempts the small employer while providing coverage for workers employed by medium and large sized companies.

H.R. Rep. No. 102-135(I), at 37 (1991) (emphasis added). *See also* H.R. Rep. No. 101-28(I), at 24 (1989). Congress clearly contemplated and accepted the scope of the exemption granted to employers such as Progressive who employ less than 50 employees within 75 miles. Congress firmly

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[15] Petitioner's only arguments for striking this regulation are (1) the term "radius" can be found in Senate and House reports; and (2) the term "radius" can be found in numerous court opinions. However, the term "radius" is not located in the Act itself, and all courts that have used the term "radius" when citing the statute have done so colloquially or in mere dicta. None of the cited opinions analyzed the proper method of measuring "miles" or actually applied a 75-mile "radius" under the F.M.L.A. exemptions.

delineated the exemption at 50 employees, thereby declaring that any employer with less than 50 employees within 75 miles of the worksite shall not be burdened by the requirements of the F.M.L.A. It is undisputed that Progressive did not employ 50 employees within 75 miles of Petitioner's worksite. Thus, Progressive exemplifies the small operation that Congress specifically intended to exclude from the burdens of the F.M.L.A.

III. The Tenth Circuit Opinion is Reasonable and Does Not Fail to Apply Existing Law

Petitioner argues that the Tenth Circuit failed to adhere to Federal Rule of Civil Procedure 4 and cases interpreting 15 U.S.C. § 1293, which use a "radius" method to measure distance. However, the specific purpose of this exemption, separate and apart from all others, is to alleviate the difficulties faced by employers when reassigning employees to geographically separate facilities. In other words, as aptly stated by the Tenth Circuit:

> The statutory purpose underlying the 50/75 provision and those underlying FED. R. CIV. P. 4(k) and the Sherman Act are certainly not the same; therefore, the type of geographic measurement used with regard to FED. R. CIV. P. 4(k) and the Sherman Act has little or no relevance to which measurement should be used with regard to the 50/75 provision. Moreover, even assuming the purposes underlying the three were similar, the question we must answer pursuant to *Chevron* is not whether we would employ a surface measurement in the first instance, *see Bellum*, 407 F.3d at 740 n.7 ("[T]he only question for us is whether the Secretary's construction of the statute is permissible, not the best."), but whether

> the DOL's use of a surface measurement is arbitrary, capricious, or contrary to the F.M.L.A. We hold it is not.

Hackworth, 468 F.3d at 730.

Lastly, Petitioner contends that the Tenth Circuit failed to apply existing law. Though Petitioner cites twelve cases in which the term "radius" can be found, Petitioner acknowledges that no court has determined this issue – save the court in *Bellum*. Those twelve cases referencing the word "radius" contain nothing more than *dicta*. The Tenth Circuit clearly did not fail to apply existing law, for there is no existing law (in Petitioner's favor) to be applied.

IV. The Issue Presented on Appeal Does Not Constitute an Issue of National Importance

There exists no circuit split on this particular issue, and there is no emerging minority view to create a circuit split. The Tenth Circuit and Fifth Circuit are the only circuits that have opined on the definition of "miles" in 29 U.S.C. § 2611(2)(B)(ii) and on the validity of 29 C.F.R. § 825.111(b), and they are in agreement. If Congress deems the Tenth or Fifth Circuit opinions an unwarranted interpretation of the statute or the regulation, it can easily amend the statute to express its intended method of measuring miles. This response is unlikely, however, considering that the regulation defining "miles" as surface miles has existed since 1995 without further comment or action from Congress. Because remedies short of judicial review are available to settle a circuit split should one arise, it is not necessary to grant a Writ of Certiorari.

V. The District Court and the Tenth Circuit Properly Refused Petitioner's Untimely Request to Conduct Additional Discovery

The crux of Petitioner's appeal is that the lower courts should have allowed her to rely upon a Rule 56(f) affidavit *after* judgment was entered. It is undisputed Petitioner never asked – even implicitly – for more time to conduct discovery on the issue of whether Progressive's payroll records (which demonstrated the number of employees at each location) were correct before the District Court issued its April 28, 2005, Order granting Respondents' Motion for Summary Judgment. Subsection (f) of Fed. R. Civ. P. 56 provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

It is undisputed that Petitioner did not take advantage of this procedural mechanism when responding to the Motion for Summary Judgment of Respondent. The record is clear that Petitioner did not offer, or otherwise reference, an affidavit explaining the unavailability of facts necessary to oppose Respondents' Motion for Summary Judgment. (*See* Petitioner's App., pp.22-33.)

This Court has made it crystal clear that Petitioner had three options when responding to Respondents' Motion for Summary Judgment. One of those options was to submit an affidavit explaining why further discovery is necessary, pursuant to Rule 56(f). *See Celotex Corp. v.*

Catrett, 477 U.S. 317, 333, n.3, 106 S. Ct. 2548, 2558 (1986). The purpose of Rule 56(f) is to defeat or stay summary judgment motions when the adverse party has not had an opportunity to discover information necessary to oppose the motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, n.5, 162 S. Ct. 2505, 2511 (1986). "However, Rule 56(f) does not operate automatically. Its protections must be invoked and can be applied only if the party satisfies certain requirements." *Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000). If an opposing party fails to take advantage of the protections of Rule 56(f), there is no abuse of discretion in granting summary judgment if it is otherwise appropriate. *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 832-33 (10th Cir. 1986); *Shavrnoch v. Clark Oil and Refining Corp.*, 726 F.2d 291, 294 (6th Cir. 1984); *THI-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 994 (9th Cir. 1980); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S. Ct. 1790 (1979).

It is undisputed Petitioner did not assert in her Response to the summary judgment that she needed time to conduct discovery before responding, much less attach the appropriate affidavit. (*See* footnote 5, *supra*.) Rather, Petitioner made a strategic decision not to request additional time to conduct discovery before filing a response brief. In fact, every statement contained within her Motion for Reconsideration could have been made to the district court when responding to the Motion for Summary Judgment. Petitioner chose the manner in which to respond to Respondents' motion, and Petitioner apparently believed that she could defeat Respondents' motion without conducting discovery. If this Court were to rule in Petitioner's favor, it would set the dangerous precedent that a plaintiff

can always have two bites at the apple during the dispositive motion stage of litigation. In other words, if Petitioner's logic is adopted, a plaintiff will have no incentive to determine, up front, whether additional discovery is needed. Instead, a plaintiff will not make this determination until it has received an adverse ruling on a dispositive motion, at which time the Plaintiff will simply ask for a "reconsideration." Obviously, neither the Federal Rules of Civil Procedure nor common sense allow for such an absurd result.

Essentially, Petitioner takes issue with the fact that Respondents moved for summary judgment prior to the status conference. However, Petitioner fails to remember or acknowledge that Respondents had the ability to file their motion for summary judgment "at any time." *See* Fed. R. Civ. P., Rule 56(b). In other words, there is no grace period a defendant must endure before seeking relief under Rule 56. Thus, Petitioner's reliance upon *Celotex* and *Anderson* is completely misplaced. In fact, this court in *Celotex* specifically stated if a party opposing summary judgment feels they have been "railroaded" by a premature motion for summary judgment, the protections of Rule 56(f) may be invoked. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2554 (1986). There is no question that a party should be entitled to sufficient time to conduct discovery in response to a dispositive motion – if such a request is made before judgment is entered.

Again, Petitioner fails to cite a single case to support her position that a Rule 56(f) affidavit can be utilized after judgment is entered. Because there is no circuit split on this particular issue and the Tenth Circuit's opinion does not conflict with any of this Court's holdings, it is not necessary to grant a Writ of Certiorari.

CONCLUSION

The F.M.L.A. is silent as to the proper method of measuring "miles" as stated in the F.M.L.A.'s small operations exemption, and historical references to a 75-mile "radius" lost all significance when Congress deleted the term from the final version of the Act. The accompanying regulation that defines "miles" as "surface miles, using surface transportation" directly parallels the stated purpose of the F.M.L.A.'s small operations exemption – namely, to reassign employees to geographically separate facilities while another employee takes F.M.L.A. leave. Therefore, the regulation is not arbitrary, capricious or manifestly contrary to the statute. Accordingly, the Tenth Circuit's decision upholding the regulation as a permissible interpretation of the statute should be upheld, particularly since no other district court or court of appeals has rendered a contrary decision. Further, Petitioner clearly failed to timely invoke the protection of Rule 56(f). For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH, Plaintiff, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, and JERRY JOHNSON, individually, Defendants.	Case Number: CIV-05-11-R

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT

(Filed Mar. 29, 2005)

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and LCvR 56.1, Defendants, Progressive Casualty Insurance Company ("Progressive") and Jerry Johnson ("Johnson") (collectively referred to as "Defendants"), move the Court for summary judgment in their favor and against Plaintiff, Kelly Hackworth ("Plaintiff"), for the

reason that this Court lacks subject matter jurisdiction.[1] In support thereof, Defendants submit the following brief.

DEFENDANTS' STATEMENT OF UNDISPUTED, MATERIAL FACTS

1. Plaintiff was an employee of Progressive from March 26, 1996, to June 22, 2004. (*See* Affidavit of Amy Harland, ¶ 3, attached as **EXHIBIT A**.)

2. Plaintiff alleges she requested time off from work with Progressive Lander the Family Medical Leave Act on March 19, 2004. (*See* Plaintiff's Complaint, ¶ 8.)

3. Plaintiff's worksite on March 19, 2004, was located at 2420 Springer Drive, Norman, Oklahoma 73069. (*See* Affidavit of Amy Harland, ¶ 4, **EXHIBIT A**.)

4. On March 19, 2004, Progressive employed 47 employees within 75 surface miles of 2420 Springer Drive, Norman, Oklahoma 73069. (*See* Affidavit of A. Harland, ¶ 17, **EXHIBIT A**.)

5. As of March 19, 2004, there were six Progressive field offices in Oklahoma. The field offices were in Oklahoma City, Tulsa, Enid, Norman, Lawton, and Muskogee. (*See* Affidavit of Amy Harland, ¶ 7, **EXHIBIT A**.)

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[1] As described below, it is not entirely clear whether a Rule 12(b)(1) motion to dismiss based upon the same facts relied upon herein would be converted to a motion for summary judgment. Defendants have proceeded herein as if a conversion would be made, and have titled this Motion accordingly. However, out of an abundance of caution and for procedural purposes, Defendants also move, in the alternative, for dismissal under Fed. R. Civ. P., Rule 12(b)(1).

6. On March 19, 2004, the Oklahoma City office was located at 9211 Lake Hefner Parkway, Suite 200, Oklahoma City, Oklahoma 73120. (*See* Affidavit of Amy Harland, ¶ 8, **EXHIBIT A**.)

7. On March 19, 2004, the Tulsa office was located at 10830 East 45th Street, Tulsa, Oklahoma. (*See* Affidavit of Amy Harland, ¶ 9, **EXHIBIT A**.)

8. On March 19, 2004, the Enid office was located at 124 North Oakwood Road, Enid, Oklahoma 73073. (*See* Affidavit of Amy Harland, ¶ 10, **EXHIBIT A**.)

9. On March 19, 2004, the Norman office was located at 2420 Springer Drive, Norman, Oklahoma 73072. (*See* Affidavit of Amy Harland, ¶ 11, **EXHIBIT A**.)

10. On March 19, 2004, the Lawton office was located at 1315 Northwest Sheridan Road, Lawton, Oklahoma. (*See* Affidavit of Amy Harland, ¶ 12, **EXHIBIT A**.)

11. On March 19, 2004, the Muskogee office was located at 2421 South York, Suite 14, Muskogee, Oklahoma 74403. (*See* Affidavit of Amy Harland, ¶ 13, **EXHIBIT A**.)

12. Progressive's Oklahoma City office is 31.47 surface miles from the Norman office. (Mileage computed by Map quest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT B**.)[2]

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[2] *See In re Extradition of Gonzalez*, 52 F.Supp.2d 725, 731 (W.D. La 1999) (judicial notice taken of Mapquest's surface mile distance between two fixed points).

13. The Tulsa office is 129.02 surface miles from the Norman office. (Mileage computed by Mapquest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT C.**)

14. The Enid office is 120.17 surface miles from the Norman office. (Mileage computed by Mapquest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT D.**)

15. The Lawton office is 79.8 surface miles from the Norman office. (Mileage computed by MSN Maps (http://www.mappoint.msn.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT E.**[3])

16. The Muskogee office is 149.68 surface miles from the Norman office. (Mileage computed by Mapquest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT F.**)

17. The only Progressive field office within 75 surface miles of the Norman office on March 19, 2004, was the Oklahoma City office. (*See* Affidavit of Amy Harland, ¶ 14, **EXHIBIT A.**)

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[3] When computing the distance between Lawton and Norman, Mapquest did not recognize the shortest distance between the two offices (Mapquest referenced 89.22 miles from Norman to Lawton). Specifically, Mapquest did not recognize that The Bailey Spur opened in 2003, giving a more direct route of travel from Norman to Lawton. MSN Maps recognizes The Bailey Spur short cut.

STATEMENT OF THE CASE

This case arises out of Defendants' alleged violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654. Specifically, on January 4, 2005, Plaintiff filed a Complaint against her former employer, Progressive, raising a single cause of action: FMLA interference, restoration and discrimination.

In her Complaint, Plaintiff alleges that beginning **March 19, 2004,** her mother was hospitalized for two weeks. (*See* Complaint, ¶ 7.) Plaintiff further alleges that, on the first day of her mother's hospitalization, she requested leave from her employer, Progressive, under the FMLA. (*See* Complaint, ¶ 8.) Plaintiff alleges that, immediately after she made her FMLA request, Johnson, her direct supervisor, offered Plaintiff either a job demotion or a severance package. (*See* Complaint, ¶¶ 6 and 9.) Plaintiff's last substantive allegation is that when her FMLA leave expired on June 1, 2004, she was not offered a return to work in her current or an equivalent position. (*See* Complaint, ¶¶ 14 and 34.) For jurisdictional purposes, Plaintiff also alleges that she worked at a location where at least 50 employees were employed by Progressive within 75 miles. (*See* Complaint, ¶ 29.) As set forth below, this jurisdictional averment is simply untrue.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

A. Rule 12(b)(1) Motion to Dismiss

It is well known that Fed. R. Civ. P., Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. *See Holt v. United States of America,* 46

F.3d 1000, 1002 (10th Cir. 1995). First, a defendant may make a facial attack on the complaint's allegations as to subject matter jurisdiction, which questions the sufficiency of the complaint. *Id.* But, in reviewing a facial attack on the complaint, the district court must accept the allegations of the complaint as true. *Id.*

A *factual* attack, on the other hand, challenges the existence of subject matter jurisdiction in fact, irrespective of what the plaintiff alleges in the pleadings. When a factual attack is made, matters outside the pleadings, such as testimony and affidavits, maybe considered. *Id.* at 1003. Thus, when reviewing a factual attack on subject matter jurisdiction, "a district court may not presume the truthfulness of the complaint's factual allegations." *Id.* In such a case, the court's reference to matters outside the complaint does not convert the motion to a motion for summary judgment under Fed. R. Civ. P. 56. *Id.* "However, a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Id.* If subject matter jurisdiction is dependant on the same statute which provides the substantive claim in the case, the jurisdictional question is intertwined with the merits of the case. *Id.* at 1003. In the case at bar, Defendants are mounting a factual challenge, with supporting evidence, to the existence of subject matter jurisdiction, and Defendants are relying on the same Act (FMLA) to challenge jurisdiction. Accordingly, it can be argued that Defendants' jurisdictional challenge appears to be intertwined with the merits of the case. Thus, Defendants will proceed herein as if the Rule 56 standard applies as opposed to the Rule 12(b)(1) standard.

B. Rule 56 Motion for Summary Judgment

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P., Rule 56(c). The district court, when applying this standard, views the evidence and makes reasonable inferences from the evidence in the light most favorable to the non-moving party. *Byers v. City of Albuquerque,* 150 F.3d 1271, 1274 (10th Cir. 1998). The movant must show the absence of a genuine issue of material fact, but the movant is not required to negate the non-movant's claim. *Jenkins v. Wood,* 81 F.3d 988, 990 (10th Cir. 1996). When the movant carries this burden, the non-movant may not rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof. *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir. 1999). An issue of material fact is genuine only if a non-movant presents facts such that a reasonable jury could find in favor of the movant. *Id.*

A challenge of the sufficiency of Federal subject matter jurisdiction can be properly raised in a Rule 12(b)(1) motion, or as a Rule 56 motion for summary judgment. *See Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 (10th Cir. 2002). Thus, regardless which standard this Court employs, Defendants submit that this Court lacks subject matter jurisdiction for the reasons set forth below.

SUMMARY OF THE ARGUMENT

The FMLA defines "employer" to include any person engaged in commerce employing 50 or more employees. *See* 29 U.S.C. § 2611(4). However, Congress specifically excluded from coverage under the FMLA "any employee of an employer who is employed at a worksite at which the employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." *See* 29 U.S.C. § 2611(2)(B)(ii). The requisite number of employees is based on the number of employees maintained on the payroll at the time the employee gives notice of the need for leave. 29 C.F.R. §§ 825.111(c) and 825.110(f).

Here, although Progressive employs more than 50 employees nationwide, it employed only 47 employees at or within 75 miles of where Plaintiff worked on March 19, 2004 (the date Plaintiff requested leave under the FMLA). (*See* Affidavit of Amy Harland, ¶ 17, **EXHIBIT A**.) Thus, the plain language of the FMLA clearly excludes Plaintiff from coverage under the Act. As a non-eligible employee under the FMLA, Plaintiff is prohibited from advancing a claim for either FMLA discrimination or retaliation before this Court because it lacks subject matter jurisdiction.

PROPOSITION: THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S FMLA CLAIM.

A. General Overview of the FMLA

The purpose of the FMLA is to balance the demands of the workplace with the needs of employees to take leave from work because of medical conditions or compelling family needs, such as the care of a parent. *See* 29 U.S.C.

§ 2601(B). Thus, the FMLA allows eligible employees to take up to 12 weeks of unpaid leave for qualifying reasons, and ensures that they will be restored to their former positions upon return to work. *See* 29 U.S.C. §§ 2612 and 2614(a)(1). The FMLA provides a private right of action allowing employees to recover damages and seek equitable relief from employers who violate the FMLA. *See* 29 U.S.C. § 2617(a)(1).

In consideration of the employer's interests, Congress limited the effect of the FMLA on small businesses, perhaps due to "Congress' desire not to burden small businesses by requiring them to operate without employees for an extended period of time or their determination that the effect upon commerce from the small companies is diminimus. . . . " *Douglas v. E. G. Baldwin & Assoc., Inc.*, 150 F.3d 604, 608 (6th Cir. 1998). Further, as part of a compromise in passing the FMLA legislation, Congress drafted an additional exception, which was created for "small operations" – that is, a potentially large company with a relatively small satellite office in a particular area. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1148 (10th Cir. 2004). This provision was designed to accommodate employer concerns about "the difficulties that an employer might have in reassigning workers to geographically separate facilities." *Id.*, quoting *H.R. Rep.* No. 102-135, (1), at 37 (1991).[4] With these eligibility restrictions, "Congress recognized that only about 40-50

[4] In other words, it might be reasonable to expect an employer to relocate workers from nearby facilities for the period of a FMLA leave (such as reassigning someone temporarily from Oklahoma City to Norman), but it would be understandably more difficult to reassign an employee from Tulsa to work in Norman for three months.

percent of all employees would be covered by the Act." *Harbert,* 391 F.3d at 1148, citing *S. Rep.* No. 102-68, at 24 (1991).

Coupled with the eligibility restrictions set forth above are strict numerical requirements set forth in the FMLA's definitions of covered employers and qualified employees. *See Grimsley v. Fiesta Salons, Inc.,* 2003 WL 117985, *4 (E.D. Mich. Jan. 7, 2003). For example, the term "employer" means:

> any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

29 U.S.C. § 2611(4)(A)(i).

Further, the term "employee" is defined as one who has worked for a covered employee for at least 12 months and at least 1,250 hours during the previous 12 months. But, the FMLA excludes:

> any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

29 U.S.C. § 2611(2)(B)(ii).

In this case, Progressive does not dispute that it is a covered employer inasmuch as its national workforce exceeds 50 workers. However, Progressive did not employ 50 or more people within 75 miles of Progressive's Norman field office where Plaintiff was employed on March 19, 2004. In other words, Progressive, "a large employer with

geographically dispersed employees, is precisely the type of employer Congress intended to protect with its enactment of the 50/75 provision." *Harbert,* 391 F.3d at 1150.

B. Standards for Determination of Whether a Person Qualifies as An "Employee" Under the FMLA Pursuant to 29 U.S.C. § 2611(2)(B)(ii)

Congress granted the Secretary of Labor the authority to prescribe regulations necessary to carry out the FMLA. *See* 29 U.S.C. § 2654. Thus, in order to determine how many employees an employer employs, for purposes of the FMLA, reference must be made to the Department of Labor's FMLA regulations. *See* 29 C.F.R. §§ 825.100-.800 (2002). In that regard, 29 C.F.R. § 825.110(f) specifically states, "[W]hether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined *when the employee gives notice* of the need for leave." (Emphasis added.) The purpose of this "is to fix the date for determination of an employee's eligibility for FMLA benefits, and to protect employees who qualify for leave when the request is made from losing eligibility if there is a reduction in the workforce thereafter." *See Grimsley,* 2003 WL 117985 at *4. Further, the distance of 75 miles is to be calculated in surface miles using available transportation, by the most direct route. *See* 29 C.F.R. § 825.111(b). Thus, for Plaintiff to be an eligible employee under the FMLA, Progressive must have employed 50 or more workers within 75 surface miles of the Norman field office on March 19, 2004.

Also, the Court is to apply the "payroll method" in assessing whether an entity employs 50 or more employees within 75 miles of the worksite. *See* 29 C.F.R. § 825.111(c); *see also Walters v. Metropolitan Educational*

Enterprise, Inc., 519 U.S. 202, 206-207 (1997) (the payroll method is the preferred method to determine employee status). Finally, "an employee's worksite under the FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned." 29 C.F.R. § 825.111(a).

C. Application of FMLA Standards to the Present Case

Plaintiff alleges she requested time off from work with Progressive under the Family Medical Leave Act on March 19, 2004. (*See* Plaintiff's Complaint, ¶ 8.) On March 19, 2004, Plaintiff's worksite with Progressive was located at 2420 Springer Drive, Norman, Oklahoma 73072. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 3.) As of March 19, 2004, neither Progressive nor Johnson employed 50 or more persons within a 75-mile distance of Progressive's Norman, Oklahoma, office. Amy Harland ("Harland"), a human resources manager at Progressive, verifies this fact. (*See* Affidavit of Amy Harland, ¶ 17, **EXHIBIT A.**)

More specifically, Progressive's only other field office within 75 surface miles of Plaintiff's worksite in Norman, Oklahoma, is located at 9211 Lake Hefner Park, Oklahoma City, Oklahoma. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 17.) Thus, Progressive's other field offices in Oklahoma – Tulsa, Muskogee, Lawton and Enid – cannot be considered in the FMLA jurisdictional analysis; only Norman (Plaintiff's worksite) and Oklahoma City can be considered.

Harland reviewed Progressive's March 27, 2004 payroll ledger for Oklahoma. (*See* Affidavit of Amy

Harland, ¶ 5, **EXHIBIT A.**) The payroll ledger demonstrates that, between March 14 and March 27, 2004, Progressive employed 101 persons within Oklahoma. (*See* ledger attached as **EXHIBIT G.**) Harland also reviewed pertinent computer personnel file information on each Oklahoma employee and/or spoke with Progressive employees to confirm each employee's worksite as of March 19, 2004. (*See* Affidavit of Amy Harland, ¶ 6, **EXHIBIT A.**) After eliminating the persons who worked in the above-referenced, non-relevant field offices, **Harland confirms that, as of March 19, 2004, Progressive employed 47 persons in the Norman and Oklahoma City field offices, combined.** (*See* Affidavit of Amy Harland, ¶ 17, **EXHIBIT A**; *see also* Employee Roster which identifies every person employed at Progressive's Norman and Oklahoma City field offices as of March 19, 2004, attached as **EXHIBIT H.**)

The FMLA only applies to "eligible employees." Plaintiff cannot prove that she is an "eligible employee" as defined by the FMLA. Progressive did not employ 50 or more employees at its Norman field office, or within 75 miles of the Norman field office on March 19, 2004. Because being an "eligible employee" is an essential element to confer subject matter jurisdiction on a federal court, Plaintiff cannot make a *prima facie* showing that this Court has subject matter jurisdiction over her claims. Since the Court does not have federal subject matter jurisdiction, Defendants' Motion for Summary Judgment must be granted. *See Womble v. Bhangu,* 864 F.2d 1212, 1213 (5th Cir. 1989) (federal courts do not have subject matter jurisdiction over claims involving employers with fewer employees than required by the statute).

This conclusion was reached in a factually similar case, *Douglas v. E.G. Baldwin & Assoc., Inc.*, 150 F.3d 604, 608 (6th Cir. 1998). In *Douglas*, it was unquestioned that the employer employed far more than 50 employees nationwide. Further, there was no serious dispute that the employer employed less than 50 employees within 75 miles of the pertinent location. Although the employer did not employ the requisite number of employees to be a FMLA covered employer, the employer voluntarily complied with the FMLA. The employee took FMLA leave and, when she returned, her position had been eliminated. She was offered a position that was not "equivalent" to the position she held prior to her FMLA leave. She brought claims against her employer under the FMLA. The Sixth Circuit Court of Appeals held that federal courts are courts of limited jurisdiction, and therefore, it could not hear the employee's FMLA claims against her employer because she was not an eligible employee under the FMLA. Thus, the federal court did not have subject matter jurisdiction and the plaintiff's claims were dismissed. *Id.* at 605.

A similar situation was presented in *Bliss v. Jennifer Convertibles, Inc.*, 2003 WL 22239655 (N.D. Ill. Sept. 29, 2003). In that case, the plaintiff worked in Chicago for a nationwide furniture store. Despite the fact that defendant maintained a written policy granting each employee a leave of absence regardless of the employee's eligibility under the FMLA, the court dismissed the plaintiff's FMLA lawsuit, concluding that the plaintiff was not an eligible employer under the act because the defendant employed fewer than 50 employees at or within a 75 mile radius of the store where plaintiff worked. The court also noted that the plaintiff's FMLA retaliation claim also failed under the same eligibility principle – "there is ample

authority . . . that one cannot bring a claim for retaliation under the Act in response to a request for FMLA leave if one is ineligible for FMLA leave." *Id.* at *17, citing *Morehardt v. Spirit Airlines, Inc.,* 174 F.Supp.2d 1272, 1281 (M.D. Fla. 2001) ("where the employee takes leave, or requests to take leave, that he is not eligible for . . . the employee cannot be deemed to have engaged in protected activity and, therefore, termination by the employer in such a circumstance cannot be grounds to support a retaliation claim under the FMLA").

Simply put, if an employer does not employ 50 or more employees on the date the employee gives notice of the need for FMLA leave, then the employee is not an "eligible employee," as defined by the FMLA. If the employee is not eligible for FMLA leave, the court lacks subject matter jurisdiction over the action. *See Wascura v. Carver,* 169 F.3d 683, 685 (11th Cir. 1999) ("where a defendant in an FMLA suit does not meet the statutory definition of 'employer,' there is no federal subject matter jurisdiction over the claim against the defendant"); *see also Hukill v. Auto Care, Inc.,* 192 F.3d 437 (4th Cir. 1999) (because the employer had fewer than 50 employees, the district court lacks subject matter jurisdiction over the employee's claims); *Humenny v. Genex Corp., Inc.,* 390 F.3d 901, 905 (6th Cir. 2004) ("if the plaintiff does not qualify as an 'eligible employee,' the plaintiff does not state a claim for relief under the FMLA"); *Coen v. Sybron Dental Specialties,* 2001 WL 45478 (6th Cir. 2001) (provisions of FMLA did not apply where employer had only 17 employees at or within 75 miles of office where employee worked); *Paleologos v. Rehab Consultants, Inc.,* 990 F. Supp. 1460, 1468 (N.D. Ga. 1998) (employer who did not employ at least 50 people at or within a 75 mile radius of employee's former

work site could not be sued under the FMLA); *Schlett v. Avco Financial Services, Inc.,* 950 F.Supp. 823, 835 (N.D. Ohio 1996) (summary judgment was proper against employee's FMLA claim where employer employed less than 50 employees within 75 miles of employee's worksite); *Muller v. The Hosty Corporation,* 917 F.Supp. 1389, 1418-1419 (N.D. Iowa 1996) (summary judgment was proper against employee's FMLA claim where employer employed less than 50 employees within 75 miles of employee's worksite regardless of whether employer admitted that it was an "employer" as defined under the FMLA).

It is undisputed that Plaintiff worked at Progressive's Norman field office on March 19, 2004. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 3.) It is also cannot be disputed that on March 19, 2004, there were fewer than 50 employees of Progressive employed within a 75 mile distance of Progressive's Norman field office. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 4.) Therefore, Plaintiff is not an "eligible employee" as defined by the FMLA. *See* 29 U.S.C. §§ 2611(2)(B). Because Plaintiff is not an eligible employee, this Court, like the district courts in *Douglas, Bliss, Coen, Schlett and Muller,* does not have subject matter jurisdiction. Thus, Defendants' Motion for Summary Judgment must be granted.

CONCLUSION

To be eligible, an employee must be among a workforce of sufficient size in a certain geographical location to claim the benefits of the FMLA. Congress has set the lower limit at 50 employees in a 75 mile area. Because the undisputed facts demonstrate that the number of

Progressive employees within a 75 mile radius of Plaintiff's worksite was less than 50, Plaintiff is not able to prove an essential element of her claim under the FMLA, and the Court must grant Defendants' Motion for Summary Judgment.

Respectfully submitted,

/s/ Brad Roberson
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CERTIFICATE OF SERVICE

■ This is to certify that on the 29th day of March, 2005, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Woodrow K. Glass, Esquire
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ATTORNEYS FOR PLAINTIFF

☐ I hereby certify that on the ___ day of ___, 2005, I served the attached document by U.S. Mail on the following, who are not registered participants of the ECF System:

/s/ Brad Roberson
For the Firm

[Exhibits Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) KELLY HACKWORTH, Plaintiff,	)	
-vs-	)	
(1) PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation and (2) JERRY JOHNSON, individually, Defendants.	)	Case No. CIV-05-11-R

PLAINTIFF'S BRIEF IN RESPONSE AND OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 18, 2005)

Plaintiff Kelly Hackworth ("Hackworth") submits the following brief in response and objection to Defendants Progressive Casualty Insurance Company Jerry Johnson's ("Johnson") motion to dismiss. The overwhelming majority of circuit and district courts have found that, under the unambiguous language of the controlling statute, individual supervisors such as Johnson can be held liable under the Family Medical Leave Act ("FMLA"). Hackworth contends that this Court should follow the majority's lead, and respectfully requests that this Court deny Johnson's motion. Hackworth further states as follows:

SUMMARY OF FACTS

This is a case where an employee was retaliated against and terminated for requesting time off of work under the FMLA. Kelly Hackworth began working for

Progressive Casualty Insurance Company ("Progressive") on or about the 26th day of March, 1996, and was promoted to Injury Ops Manager II in 2000. Hackworth's supervisor, Jerry Johnson, worked at [sic] the state claims manager for Progressive, and provided direct supervision over Hackworth's work activities.

On March 19, 2004, Hackworth's mother became ill and was hospitalized with severe septic arthritis of her shoulder and was required by her medical doctor to remain hospitalized for two weeks. Hackworth contacted Progressive on March 19, 2004 and requested time off from work to care for her mother and further requested leave under the Family Medical Leave Act ("FMLA").

On the same day of Hackworth's request for FMLA, Johnson, Hackworth's direct supervisor, offered Hackworth either a demotion from her position of Injury Ops Manager II to an Injury Ops Manager I or severance package. Johnson gave Hackworth three (3) days of paid time off to consider his offer and, at the end of this three-day period, Hackworth was off from work on approved FMLA. Following her release from the hospital, Hackworth's mother required constant daily care and assistance at her home. Hackworth stayed with her mother to provide for the daily medical needs.

On April 23, 2004, Hackworth filed a charge of gender-based discrimination with the EEOC alleging violation of Title VII of the Civil Rights Act of 1964, as amended. On May 20, 2004, the parties to [sic] agreed to conduct a mediation session related to Hackworth's alleged gender-based discrimination charge. The mediation was scheduled for June 8, 2004. Although, Hackworth's FMLA expired on June 1, 2004, and she reported her willingness and ability

to return to work on May 28, 2004, Amy Harlan ("Harlan"), one of Progressive's employees, advised Hackworth not to return to work because her presence would be "uncomfortable" for everyone until after the EEOC mediation was completed on June 8, 2004. By agreement, Hackworth's FMLA leave was extended until June 22, 2004, and on that day, Hackworth advised of her intentions to reject the pending offer by Progressive presented to her at the mediation and instead advised that she would accept a return to work as an Injury Ops Manager I.

Harlan then contacted Hackworth and advised Hackworth not to return to work because the position of Injury Ops Manager I was eliminated in its entirety. Neither Harlan nor any other agent or employee of Progressive offered Hackworth any other equivalent work or compensation. Soon thereafter, on June 30, 2004, Progressive posted an internal job opportunity posting for an Injury Operations Manager I, the same position that Progressive informed Hackworth was being eliminated, and on July 11, 2004, Progressive posted an employment opportunity in *The Tulsa World* newspaper for the same Injury Operations Manager I position. The job was later filled on September 29, 2004.

Hackworth filed this suit alleging that Defendants violated FMLA by failing to reinstate Hackworth to her same or a similar position upon her return from leave, and by retaliating against Hackworth for engaging in a protected activity, namely, utilizing FMLA for time off work. Defendant Johnson has filed his motion to dismiss.

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED, MATERIAL FACTS

1. Admit.

2. Admit.

3. Admit.

4. Denied. First of all, Defendants have failed to provide this Court or Plaintiff with copies of the payroll records reviewed by Amy Harland. Therefore, for purposes of this response, Plaintiff cannot verify the number of employees and is not conceding that Defendants' employee numbers are completely accurate. Assuming such numbers are correct, there are actually fifty (50) employees within seventy-five (75) surface miles of Progressive's Norman office, since the Lawton office is also within seventy-five (75) miles of Norman. Exhibit "1", Norman to Lawton Information.[1]

5. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

6. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

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[1] Each Exhibit includes an information pack including the longitude and latitude of the two locations (which was determined at the website, www.geocode.com), distance between those longitude and latitude measurements (which was determined at the website, www.indo.com/distance/) and a map of the two locations (determined at the website www.keyhole.com).

7. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

8. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

9. Admit.

10. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

11. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

12. Denied. The surface distance between the Norman and Oklahoma City offices is twenty-five (25) miles. Exh. "2", Norman to Oklahoma City Information.

13. Denied. The surface distance between the Norman and Tulsa offices is 110 miles. Exh. "3", Norman to Tulsa Information.

14. Denied. The surface distance between the Norman and Enid offices is eighty-six (86) miles. Exh. "4", Norman to Enid Information.

15. Denied. The surface distance between the Norman and Lawton offices is sixty-seven (67) miles. Exh. "1", Norman to Lawton Information.

16. Denied. The surface distance between the Nôrman and Muskogee offices is 126 miles. Exh. "5", Norman to Muskogee Information.

Denied. The Lawton office is within seventy-five (75) surface miles of the Norman office. Exh. "1", Lawton to Norman Map.

ARGUMENT AND AUTHORITIES

PROPOSITION I

SUMMARY JUDGMENT IS NOT WARRANTED

Although Defendants include an argument for dismissal under Rule 12(b)(1), it appears that their motion is one for summary judgment under Rule 56. Therefore, Hackworth states that it is well known that summary judgment is appropriate only if the admissible evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). A fact is "material" if, under the governing law, it could have an effect on the outcome of the lawsuit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Horizon/CMS*, 220 F.3d at 1190. A dispute over a material fact is "genuine" if a rational jury could find in favor of the nonmoving party on the evidence presented. *See Id.*

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097(2000) the Court stated:

> "although the court should review the record as a whole, it *must* disregard all evidence favorable to the moving party that the jury is not *required* to believe. See Wright & Miller 299. That is, the court *should* give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is *uncontradicted*

> and *unimpeached*, at least that that evidence comes from *disinterested witnesses*."

120 S.Ct. at 2110 (emphasis added).

For purposes of summary judgment, Hackworth's evidence must be believed and all justifiable inferences must be drawn in her favor. For purposes of this motion, this Court must assume that Hackworth's version of the disputed facts is correct. *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1392 n.2 (10th Cir. 1997); *see also Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. Aug 11, 2000). The evidence of the party opposing summary judgment is to be believed and all justifiable inferences are to be drawn in the light most favorable to the party opposing summary judgment. *Reeves*, 120 S.Ct. at 2101; *Simms v. Oklahoma*, 165 F.3d 1321 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 53 (1999).

Summary judgment is inappropriate when the evidence presented by the parties is susceptible of different interpretations or inferences by the trier of fact. *Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995). "[A]t the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.* at 453. Hackworth contends that at the very least a dispute of fact as to how many employees Progressive employed within seventy-five (75) miles of the Norman office. In fact, Hackworth asks this Court to rule as a matter of law that Progressive did employ fifty (50) employees with [sic] seventy-five (75) miles of Norman, and further to deny Defendants' motion for summary judgment.

PROPOSITION II

PLAINTIFF IS AN ELIGIBLE EMPLOYEE UNDER THE FMLA

Hackworth first states that no discovery has been had on this case, and therefore, Hackworth has not had a chance to review Progressive's payroll records to determine if the number represented in Amy Harland's affidavit is correct or incorrect. While Hackworth does not doubt the veracity of Harland's computations, this Court is well aware that accounting mistakes can occur. Furthermore, there may be some questions of fact remaining as to whether an employee was employed at a certain branch at the time in question, or about who is on the payroll records that might be on leave, et cetera. Because Hackworth has not reviewed the payroll records in question, she is not ready to concede Defendants' stated numbers, but does accept them and relies upon them for the purposes of this response.

That being said, Hackworth further states that assuming said numbers are correct, Progressive is an "employer" as that term is defined in the FMLA, and Hackworth is an "eligible employee". While Hackworth is unsure whether Defendants' stated employee numbers are correct, she is convinced that Defendants' stated distances between the different worksites in Oklahoma is incorrect. Defendants utilize a "driving distance" technique to determine the distance between Oklahoma towns, which is inaccurate and contrary to Congress' intent to determine the number of miles between two worksites.[2]

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[2] Defendants cite the case of *In re Extradition of Gonzalez*, 52 F.Supp.2d 725 (W.D. La. 1999), for the proposition that this Court can

(Continued on following page)

The statute in question states, in relevant part, " . . . if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. §2611(2)(B)(ii). The statute specifically does not state "driving miles", or "within 75 miles if driving by car". This Court must look at the plain language of a statute to interpret its ordinary common meaning. *See Connecticut Nat'l Bank v. Germain*, 117 L. Ed. 2d 391, 112 S. Ct. 1146, 1149 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says"). When words of a statute are unambiguous, judicial inquiry should end, and the law should be interpreted according to the plain meaning of its words." *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993). Here, the plain meaning of the statute is direct mileage or surface mileage, and Defendants concede in their brief that this Court should look at a seventy-five (75) mile radius of Norman, not strictly driving distances. As is evident in Hackworth's Exhibit "6", Lawton is within the 75-mile radius of Norman.

Moreover, the only way to truly determine the surface distance between two sites is to determine the number of miles "as the crow flies." As this Court well knows, this well-known and well-used vernacular finds the distance between two points using a straight line. And in an attempt to be even more precise, Hackworth has found the longitude and latitude measurements for each of Progressive's

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take judicial notice of Mapquest's surface mile distance between two points, but actually the Louisiana Court uses Mapquest to determine the driving distance between two points, not the surface distance. Furthermore, in that particular case, the mileage was not seriously disputed, but it certainly is in the instant matter.

Oklahoma sites and measured the straight-line distance between each. Hence, Hackworth's attached exhibits setting forth the number of miles between the worksites is more reflective of Congress' intent than an imprecise calculation of miles by man-made road as portrayed by Defendants.

After using a precise determination of the number of miles between worksites, it is clear that the Lawton office is within 75 miles of the Norman office. In fact, the exact distance between the 2420 Springer office in Norman and the 1315 NW Sheridan office in Lawton is 67 miles, and under FED.R.EV. Rule 201(b)(2), this Court should take judicial notice of this fact because, as is shown in Exhibit "1", such surface mileage is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Therefore, after this Court takes judicial notice that Lawton is within a seventy-five (75) mile radius of Norman, there should be no dispute of fact as to whether the number of employees at the Lawton office should be considered in the calculations to determine whether Progressive is an "employer" under the FMLA. Defendants represent that there are three (3) employees at the Lawton office, and assuming that number is correct, the total number of employees at the Norman, Oklahoma City, and Lawton offices is fifty (50). And, since Progressive had fifty (50) employees within seventy-five (75) miles of Norman on March 19, 2004, jurisdiction in this Court is proper.

Hackworth is an eligible employee under the FMLA, and Progressive is required to follow the FMLA in this

instance. Progressive's Norman office may not have fifty (50) employees, but when those offices within seventy-five (75) miles of Norman are considered, Oklahoma City and Lawton, Progressive has fifty (50) employees, and therefore, jurisdiction in this Court for Hackworth's claims under the FMLA is proper. This Court should deny Defendants' summary judgment motion and rule as a matter of law that Defendants employ [sic] least fifty (50) employees within a seventy-five (75) mile radius of Norman.

CONCLUSION

Defendants incorrectly state that Lawton is not within seventy-five (75) miles of Norman. Their attached driving direction maps are inaccurate and do not adequately reflect the intent of the FMLA statute governing this case. The statute simply states "within 75 miles" which indicates within 75 surface miles or within a 75-mile radius of the employee's worksite. Because Defendants represent that there are fifty (50) employees at the Norman, Oklahoma City, and Lawton offices combined, Hackworth is an eligible employee under the FMLA and jurisdiction in this Court is proper.

IT IS FOR THE REASONS SET FORTH HEREIN that Plaintiff Kelly Hackworth respectfully requests that this Court deny Defendants Progressive Casualty and Jerry Johnson's motion for summary judgment and rule as a matter of law that Plaintiff has validly brought a cause of action against Defendants under FMLA.

DATED this 18th day of April, 2005.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that on this 18th day of April, 2005, a true and correct copy of the above and foregoing was electronically transmitted to the Clerk of the Court using ECF System for filing and transmittal of a Notice of Electronic Filing was electronically sent to the following counsel of record:

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Oklahoma City, OK 73102

/s/ Scott F. Brockman
Scott F. Brockman

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH,

Plaintiff,

vs.

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation,

Defendant.

Case No. CV-05-1467-M

TRANSCRIPT OF PROCEEDINGS

HAD ON FEBRUARY 12-13, 2007

TESTIMONY OF KELLY HACKWORTH

BEFORE THE HONORABLE VICKI MILES-LaGRANGE, JUDGE PRESIDING

APPEARANCES

MR. STAN WARD and MR. WOODROW GLASS, Attorneys at Law, Oklahoma City, Oklahoma, appeared on behalf of the Plaintiff.

MR. BRAD ROBERSON and MR. PAUL KOLKER, Attorneys at Law, Oklahoma City, Oklahoma, appeared on behalf of the Defendant.

* * *

[124] you were accepting the Injury Operations Manager I position, did he?

A. No.

Q. You had told Lisa Johnson, the physician's assistant for Dr. Shadid, that you had lost your job prior to June 22, 2004, didn't you?

A. Yes.

Q. You have testified that you were terminated because you were discriminated against because you are a female and because you were retaliated against because of going to the EEOC. Are there any other reasons why you believe you were terminated?

A. No.

Q. I would like for you to turn to Defendant's Exhibit 1. What Defendant's Exhibit 1?

A. The Petition.

Q. In what case?

A. Kelly Hackworth versus Progressive Casualty Insurance.

Q. What did this case involve?

A. The Family Medical Leave Act.

MR. ROBERSON: May I have permission to demonstrate this exhibit to the jury?

THE COURT: You may.

MR. WARD: Just as a matter for the record, he has not offered this document into evidence and as a general rule you don't show documents until they are in evidence.

[125] THE COURT: True.

MR. ROBERSON: I would move at this time to move the document into evidence. She has verified the document.

MR. WARD: It is not relevant or material to this lawsuit.

MR. ROBERSON: It is based upon the question –

THE COURT: Just –

MR. WARD: It is collateral, even if relevant. (Proceedings at the bench, out of the jury's hearing:)

MR. ROBERSON: She said that there was no other reason why she was terminated other than gender discrimination and retaliation. She filed a lawsuit saying she was terminated because of the violation of it.

THE COURT: I will let you question –

MR. ROBERSON: There is no objection on the pretrial, other than what was sustained in the motion in limine that you ruled on. They made no other objection.

THE COURT: Is that right?

MR. GLASS: I would have to look at the Pretrial Order.

The objection is that the pleading is not a proper exhibit and subject to a motion in limine.

MR. ROBERSON: That is the same objection with the other Complaint. We argued this previously. This

is [126] impeachment. She said there was no other reason why she was terminated.

THE COURT: I am going to let you ask the question but not introduce the Complaint into evidence. That will be the ruling of the Court and your exception is noted.

(Proceedings resumed within the hearing of the jury:)

Q. (By Mr. Roberson) In that document is there another reason why you were terminated from your employment at Progressive that you previously stated?

A. I don't know.

Q. Turn to page 7321 of that document.

A. Okay.

Q. Paragraph 38.

A. Yes, sir.

Q. Does that refresh your memory that you believed on January 4, 2005 that you were being terminated against – or you were being terminated because you had been retaliated against because you took family medical leave?

A. It says it was a direct result and the causal connection in the protected rights to which she had under the FMLA.

Q. Do you agree that you were terminated and retaliated against while employed with Progressive because you went on FMLA?

A. I believe that may have been part of the reason, yes.

Q. You filed a lawsuit against Progressive, correct?

* * *